

**TESTIMONY OF ELDON GREENBERG
ON
ASSESSING “RIGHTS” UNDER THE NUCLEAR NON-PROLIFERATION TREATY
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL TERRORISM AND NONPROLIFERATION
OF THE
HOUSE COMMITTEE ON INTERNATIONAL RELATIONS
WASHINGTON, D.C.
MARCH 2, 2006**

Good afternoon. My name is Eldon Greenberg, and I am a partner in the Washington, D.C. office of the law firm of Garvey Schubert Barer.¹ I am pleased to be here today to discuss the operation of the Treaty on the Non-Proliferation of Nuclear Weapons (the “NPT” or the “Treaty”) and, more particularly, the relationship between its prohibitions in Articles I and II and the rights to participate in the benefits of nuclear energy established in Article IV. For many years, I have been outside counsel to the Nuclear Control Institute (“NCI”), a public interest organization active on nuclear non-proliferation issues. I am testifying this afternoon in my personal behalf. However, for the most part, the views I express today are outlined in a paper that I originally prepared for NCI in the mid-1980s and revised in 1993, entitled “The NPT and Plutonium: Application of NPT Prohibitions to ‘Civilian’ Nuclear Equipment, Technology and Materials Associated with Reprocessing and Plutonium Use.” A copy of this paper is attached, and I would like to request that this paper, together with my written statement, be made part of the record of this hearing.

My views regarding the operation of the Treaty are readily stated. In essence, I believe that the rights and obligations established under Article IV can’t be neatly disentangled from the prohibitions in Articles I and II of the Treaty. Indeed, Article IV contains express language linking the three provisions. The result, in my judgment, is that it is perfectly legitimate to evaluate such factors as proliferation risk, economic or technical justification and safeguards effectiveness in determining whether specific or generic types of assistance or activities should be regarded as permissible under the NPT. The overriding purpose of the Treaty is, after all, to halt the acquisition of nuclear weapons by non-weapon states. It would be fundamentally inconsistent with this purpose to interpret the Treaty in such a fashion that it would have the perverse effect of facilitating the acquisition of such weapons.

As the Committee knows, Article I and II of the Treaty contain broad prohibitions on the conduct of weapon states and non-weapon states alike, (a) forbidding weapon

¹ My firm’s address and telephone number are: 1000 Potomac Street, N.W., Suite 500, Washington, D.C. 20007; (202) 965-7880. I am reachable at: egreenberg@gsblaw.com.

states from transferring nuclear weapons or other explosive devices to, or otherwise facilitating their development in, non-weapon states, and (b) forbidding non-weapon states from receiving, manufacturing or otherwise obtaining such weapons or devices on their own or with the assistance of others. Article IV, for its part, purports to establish broad rights for all parties to the Treaty to participate in the benefits of civil nuclear power and a corresponding obligation on the parties to facilitate such participation. This creates, as explained in my paper, a “dynamic tension” between the Treaty’s restrictions and its injunctions to cooperate.

The link between the two is found in the language of Article IV to the effect that the “inalienable right” of the parties to peaceful nuclear energy must be exercised “in conformity with articles I and II of the Treaty.” I read this language as meaning that assistance or activities which are *ostensibly* peaceful in nature still are impermissible when *as a practical matter* they are likely to lead to the proliferation of nuclear weapons.

With respect to the language of the Treaty, it is possible to read the phrase “in conformity with” as meaning no more than that a weapon state cannot transfer weapons or nuclear explosive devices to a non-weapon state or otherwise assist in their development, while a non-weapon state has a corresponding obligation not to manufacture or otherwise obtain such weapons or devices. It has in fact sometimes been suggested that Article IV essentially reflects a “straightforward bargain,” under which weapon states traded economic benefits to non-weapon states in exchange for enhanced security provided to the weapon states under Articles I and II, and no distinctions can be made among various types of “civilian” nuclear technology. This is to read the Treaty through an exclusively “explosives lens.”

There is, however, a broader and more compelling reading. Such a reading recognizes that particular assistance or activities, notwithstanding their denomination as “peaceful” or “civilian” or the application of international safeguards, may in certain situations be so risky that, even though they do not involve the transfer or acquisition of weapons or explosive devices as such, they can no longer be deemed in conformity with Articles I and II. In short, there may be activities other than final assembly and production of a “bomb” or “warhead” or “nuclear explosive device” which, in particular circumstances, should be deemed impermissible under the Treaty.

This reading is not original with me. It was forcefully advocated by the great strategic analyst Albert Wohlstetter in a report delivered to the Arms Control and Disarmament Agency in 1979. It is built, at least implicitly, into a number of provisions of U.S. non-proliferation law, including the Nuclear Non-Proliferation Act of 1978 (the “NNPA”) and the Nuclear Proliferation Prevention Act of 1994 (the “NPPA”), which recognize that certain, sensitive nuclear technologies, such as those associated with enrichment and reprocessing, can appropriately be restricted.² It makes complete

² For example, Section 402(b) of the NPPA prohibits the export of any “major critical component of any uranium enrichment, nuclear fuel reprocessing, or heavy water production facility,” unless an agreement for cooperation expressly provides for such export, while Section 826(a) of the NPPA, which is based on the Glenn and Symington Amendments of the late 1970s, imposes

sense in light of the overall purpose of the NPT to halt proliferation. It simply recognizes that, if risks are great, if there is no discernible civilian justification for particular assistance and activities and if the effectiveness of safeguards is uncertain, then such assistance and activities must perforce be questionable under the Treaty. Only in this way can there be any assurance that the NPT's objectives will be achieved. In short, whatever the "inalienable right[s]" enshrined in Article IV, they cannot be invoked to produce a result which, in the real world, entails unacceptable proliferation risks.

The history of NPT tends to support a case for what I would call a "pragmatic reading" of the Treaty. In particular, the NPT negotiators were intent on establishing a comprehensive, loophole free agreement primarily aimed at enhancing security, not promoting any and all kinds of nuclear development. In the words of one member of Wohlstetter's review group, the notion that there was any kind of "straightforward bargain," under which non-weapon states would be entitled to any nuclear technology they wanted in exchange for their non-proliferation pledges, is a "dangerous myth." In addition, the negotiators operated on the basis of certain assumptions regarding the economic merit of particular applications and the effectiveness of safeguards. To the extent these assumptions may be not be valid for these applications in particular circumstances, the nature of any "bargain" for nuclear technology is drawn into doubt. Such concerns are particularly applicable to the present day case of Iran, where the application of effective international safeguards is problematic and where the country's motives for acquiring uranium enrichment and plutonium separation technologies are highly suspect. Finally, the NPT negotiators themselves recognized that it would be inappropriate to lay down *per se* rules with respect to acceptable uses. Necessarily, this allows for an interpretation of the Treaty's restrictions, rights and obligations which considers practical risks and not just abstract principles, particularly with regard to as troubling a case as Iran.

Adrian Fisher, one of the chief U.S. negotiators of the NPT, testified several years after the NPT's ratification that the Treaty "does not require us to do something foolish." Another way of putting it is that the NPT must not be read as requiring or sanctioning actions that may increase, rather than reduce, the risk of proliferation. In such circumstances, the distinction between permissible and impermissible activities must come down to quite practical considerations. Activities should not be regarded as acceptable simply because they are labeled as "peaceful" or "civilian." The Treaty should be read through something more than an "explosives lens." Assistance and activities relating to declared "peaceful" and "civilian" programs must not be viewed as permissible, if an evaluation of all the facts and circumstances would indicate that the legitimacy of the assistance or activities is questionable. In my judgment, such a pragmatic, rather than formalistic, reading is most consistent with the Treaty's fundamental goal of stemming proliferation of nuclear weapons and enhancing global security.

economic and military assistance sanctions on countries supplying and receiving enrichment and reprocessing equipment, materials and technology.

Thank you for your consideration. I would be happy to answer any questions the Committee might have.